

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-500

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

## REPLY BRIEF FOR THE PETITIONER

---

Respondents acknowledge (Br. in Opp. 2) that a conflict exists among the courts of appeals on the precise question presented in this case. Compare *Downey v. Commissioner*, Pet. App. 70a-77a (pet. for reh'g filed Sept. 13, 1994), with *Schleier v. Commissioner*, Pet. App. 68a-69a, and *Schmitz v. Commissioner*, Pet. App. 78a-96a. These three circuits have expressly disagreed over the correct application of this Court's analysis in *United States v. Burke*, 112 S. Ct. 1867 (1992), to the specific question presented in this case—whether backpay and liquidated damages received under the Age Discrimination in Employment Act are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code.

While acknowledging that this plain conflict exists among the courts of appeals, respondents nonetheless contend that further review in this case is not warranted. They assert (i) that it is "speculative" whether anyone other than the parties to the underlying United Airlines ADEA settlement would be affected by the issues addressed here (Br. in Opp. 3), (ii) that the issue should be resolved prospectively by regulations (*id.* at 7-9) and (iii) that the question presented in this case will be controlled in the future by a 1989 amendment to the statute (*id.* at 10-12). None of the rationales offered by respondents undermines the need for this Court's resolution of the recurring conflict that this case presents.

1. There is nothing "speculative" about the fact that large numbers of ADEA payments, often involving large sums, are made each year. As neutral commentators have noted, the question addressed in this case is "an incredibly important issue because huge amounts of money are being paid out" in age discrimination cases. *Wall Street Journal*, Oct. 19, 1994, at A-1. Moreover, the legal issue presented in this case has importance not only for ADEA recoveries but also for other state and federal statutory recoveries that provide backpay and liquidated damages but which provide no compensation for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" (*United States v. Burke*, 112 S. Ct. at 1873-1874).<sup>1</sup> Unless the conflict among the circuits is resolved, recipients of

statutory remedies under the ADEA, and under like statutes, will continue to receive disparate tax treatment based solely upon the happenstance of geography.<sup>2</sup>

2. Respondents' suggestion (Br. in Opp. 7-9) that the Commissioner should resolve the issue presented in this case prospectively by adopting a new regulation interpreting the scope of Section 104(a)(2) provides no basis for declining review of the admitted conflict among the circuits. In the face of conflicting appellate decisions, the deference that would be received by a new regulation reinterpreting the same statutory language is, at best, uncertain. Moreover, even if such a regulation were issued in the future, it could not obtain equal treatment for the various litigants now before the Court, whose claims have been resolved inconsistently by the lower courts.

3. In 1989, Congress amended Section 104(a)(2) of the Code to provide that "punitive damages in connection with a case not involving physical injury or physical sickness" are not excluded from income. 26 U.S.C. 104(a)(2) (1988 & Supp. IV 1992). That amendment does not resolve the question whether back pay and liquidated damages received under the ADEA are excludable from income: (i) backpay, of course, is not a "punitive" damage and (ii) ADEA liquidated damages, whether regarded as

---

<sup>1</sup> For example, the Equal Pay Act and the Fair Labor Standards Act are similar to the ADEA in this respect. See, e.g., *Bennett v. Commissioner*, 67 T.C.M. (CCH) 2817 (1994), appeal pending, No. 94-2009 (6th Cir.).

---

<sup>2</sup> Respondents erroneously describe the Commissioner's evenhanded treatment of all parties to the United Airlines ADEA settlement as "[c]oordinated, circuit-directed litigation" designed "to produce a conflict among courts" (Br. in Opp. 11). The Commissioner is not accountable either for the fact that the question presented in this case has a national character or for the fact that the circuits have reached differing views of its proper disposition. The Commissioner's litigating position in these cases reflects her institutional responsibility to obtain proper and evenhanded treatment of all taxpayers.

"punitive" or not, are awarded to deter "willful violations" of the ADEA (29 U.S.C. 626(b)) and are not awarded "on account of" any personal injury, as the statute requires for the exclusion from income to be available. 26 U.S.C. 104(a)(2). See Pet. 14-16 & n.10.

The conflict on the frequently recurring questions presented in this case is not rendered moot prospectively by the 1989 amendment. Further review by this Court is therefore required to avoid continuing uncertainty and uneven application of the revenue laws.

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III  
*Solicitor General*

NOVEMBER 1994